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87-2007

No.

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1987

COLONIAL PIPELINE COMPANY,
Appellant,

v.

WRIGHT CONTRACTING COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

*HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

*Counsel of Record

Of Counsel:
ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607, 3400 Peachtree Road, N.E.
Atlanta, Georgia 30326

JAMES V. DAVIS
RICHARD D. HALL
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702

EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303-2122

QUESTIONS PRESENTED

1. Whether Official Code of Georgia Annotated § 51-12-5 (1982), which authorizes awards of punitive damages in tort actions "in which there are aggravating circumstances, in either the act or the intention," violates the Due Process Clause of the Fourteenth Amendment in that it fails to provide, among other things, notice of the conduct for which punishment is to be imposed, and fails to set forth any clear standard or criterion for juries to apply in determining whether to award punitive damages, and, if so, the amount of such damages.

2. Whether Official Code of Georgia Annotated § 51-12-5, *supra*, which authorizes awards of punitive damages in tort actions, violates the Equal Protection Clause of the Fourteenth Amendment in that it provides less protection for civil defendants subject to punitive damages ("fines") than criminal laws imposing fines provide to criminal defendants (e.g., notice of the prohibited conduct, proof beyond a reasonable doubt, upper limit of criminal fine specified by law).*

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* All parties to this case are named in the caption except W. Baxter Brown and Malcolm Burnsed. Because appellant believes that W. Baxter Brown and Malcolm Burnsed, who were additional appellees in the court below, have no interest in the outcome of this appeal, they have been given notice pursuant to Rule 10.4 but have not been named as parties to this appeal.

Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies; non-wholly owned subsidiaries, and affiliates of appellant: Colonial Pipeline Company's stockholders are Amoco Pipeline Company, Atlantic Richfield Company, Citgo Pipeline Investment Company, Conoco Pipe Line Company, Mobil Pipe Line Company, Phillips Petroleum International Investment Company, Sohio Oil Company, Texaco Trading and Transportation Inc., and Union Oil Company of California.

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No.

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OCTOBER TERM, 1987

COLONIAL PIPELINE COMPANY,
Appellant,
v.
WRIGHT CONTRACTING COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

JURISDICTIONAL STATEMENT

Colonial Pipeline Company ("Colonial") appeals from the final decision and order of the Supreme Court of Georgia (Case No. 44926) dated March 17, 1988 (Motion for Rehearing denied March 30, 1988), affirming a judgment of the Superior Court of Dougherty County awarding the appellee the sum of $52,728.48 for actual damages to its bulldozer, and $304.75 for consequential damages, and reversing the judgment for $5,000,000.00 punitive damages, and remanding this case to the trial court for a new trial as to punitive damages (only). By requiring appellant to submit to a new trial as to punitive damages the Supreme Court of Georgia has denied appellant protections guaranteed to it by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, in that the statute, Official Code of Georgia Annotated § 51-12-5 (1982), upon which such punitive damages have been and will be predicated, is unconstitutional for the reasons set forth below.

OPINIONS BELOW

The plurality opinion of the Supreme Court of Georgia dated March 17, 1988, and the concurring and dissenting opinions, are reproduced in the Appendix, *infra*, beginning at A-1, and are reported at 258 Ga. 115, 365 S.E.2d 827 (1988). The supplementary opinion of the Supreme Court of Georgia issued on Motion for Rehearing dated March 30, 1988, is reproduced, *infra*, at A-16, and is reported in the reports cited above. The judgment of the Superior Court of Dougherty County dated July 23, 1986, is reproduced, *infra*, at A-17, and is unreported.

JURISDICTION

The March 17, 1988, decision of the Supreme Court of Georgia (App. A-1), motion for rehearing denied March 30, 1988 (App. A-18), necessarily upheld, *sub silentio*, Official Code of Georgia Annotated (O.C.G.A.) § 51-12-5, against appellant's claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1] Although the plurality opinion of the Supreme Court of Georgia recognizes only that appellant challenged the punitive damages statute and award in this case on two grounds, due process and the Eighth Amendment prohibition against excessive fines (App. A-4, *infra*), the dissenting opinion recognizes that appellant raised not only the due process and excessive fine issues but also the denial of its right to equal

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[1] In *Lawrence v. State Tax Comm'r.*, 286 U.S. 276, 282 (1931), the Court accepted jurisdiction of a case from the Supreme Court of Mississippi in which that court had not expressly ruled upon the constitutional question raised, holding that a person's constitutional rights are denied by the refusal of the state court to decide the question, just as by an erroneous decision of the question.

Similarly, in *Bankers Life and Casualty Co. v. Crenshaw*. 56 U.S.L.W. 4418 (Decided May 16, 1988), this Court decided the validity of Mississippi's appeal penalty statute even though the Mississippi Supreme Court had not written an opinion upholding the validity of its statute.

protection (A-13-14). The constitutional questions were properly presented, as will be set forth in greater detail below.[2]

A notice of appeal of this case to this Court was timely served and received by the court below on May 25, 1988, App. A-19, *infra*. This Court has jurisdiction of this case under 28 U.S.C. 1257(2).[3]

This appeal is being docketed in this Court within ninety (90) days from the March 17, 1988, decision of the Supreme Court of Georgia denying appellant's Fourteenth Amendment challenges to O.C.G.A. § 51-12-5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the Constitution provides, in pertinent part, that:

> [N]or shall any State deprive any person of . . . property, without due process of law . . .

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[2] Appellant also filed a Motion for Rehearing (App. A-33), pursuant to Georgia Supreme Court Rule 47, in which it sought rehearing of the denial of its Fourteenth Amendment due process and equal protection challenges to O.C.G.A. § 51-12-5 and the requirement that appellant submit to a new trial as to punitive damages pursuant to an unconstitutional statute.

[3] The requirement of finality is satisfied here because "The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the demands of the state cause of action are proved. They may prevail at trial on non-federal grounds, it is true; but if the Georgia court erroneously upheld the statute, there should be no trial at all." *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 485 (1975). This is particularly so here because retrial itself (regardless of the outcome) violates appellant's due process and equal protection rights against double jeopardy, as set forth below. See *Abney v. United States*, 431 U.S. 651, 660-661 (1977).

2. The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that:

> [N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.

3. Section 51-12-5 of the Official Code of Georgia Annotated (1982), as it existed at all times pertinent to this appeal, provided that:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that a judgment imposing punitive damages for damage solely to personal property, a $53,000 bulldozer, has deprived and will deprive appellant of substantial rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The constitutional issues presented are substantial and are intimately related to similar questions briefed and argued to, but not decided by, this Court in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), and *Bankers Life and Casualty Co. v. Crenshaw,* 56 U.S.L.W. 4418 (Decided May 16, 1988). These issues, as shown below, were properly presented to the courts of Georgia.

A. Facts Relevant to the Constitutional Questions Presented

On June 15, 1982, a bulldozer owned by appellee Wright Contracting Company, while doing grading work for Mr. Baxter Brown, struck and ruptured an underground petroleum pipeline belonging to appellant Colonial. Diesel fuel in the pipeline was

released and appellee's bulldozer caught fire and was destroyed (T 582-584, 174).[4]

In May 1983, Wright Contracting Co. filed this property damage action in the Superior Court of Dougherty County, alleging that the damage done to its bulldozer was due to the negligence of three defendants, Colonial, Baxter Brown and Brown's surveyor, Malcolm Burnsed (R 33). Wright Contracting Co. sought to recover from these three defendants the damage to its bulldozer, and, from Colonial only, $1,000,000.00 in punitive damages (R 37). Later Wright Contracting Co. amended its complaint to increase its punitive damage claim against Colonial to $10,000,000.00 (R 128).

In its complaint, Wright Contracting Co. alleged that Colonial was negligent because it (1) failed to bury the pipeline to a safe and sufficient depth; (2) failed to erect and maintain adequate signs indicating the presence of the pipeline; (3) failed to mark the pipeline with any other sufficient or adequate warning devices; (4) failed to list its pipeline where plaintiff could investigate and discover its existence and location; and (5) failed to take any other measure to warn plaintiff of the location or depth of the pipeline (R 35-36).[5]

The case was tried before a jury and the evidence showed as follows:

Colonial, a Delaware corporation, is an interstate common carrier of refined petroleum products (T 977, 174). In 1976 Colonial had an independent contractor install the 12 inch pipeline which runs the approximately 230 miles from Atlanta, Georgia to Bainbridge, Georgia (T 176, Ex. 17, T 892, Ex. 105, T 106). To do so, Colonial acquired an easement from the then owners of the land, R.W. and Eloise Cross, for the necessary right of way adjacent and parallel to Westover Road in northwest

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[4]The driver of the bulldozer received burns which caused his death, but this litigation does not involve the claims for his personal injuries or death.

[5]It should be noted that all of Wright's allegations of negligence against Colonial involved alleged omissions, not affirmative acts.

Albany, Georgia (Ex. 11). A special condition of this particular easement required that the pipeline be laid a minimum of 30 inches below the grade of Westover Road (Ex. 11). Unbeknownst to Colonial, the independent contractor installing the pipeline in 1976 did not comply with this special condition. On December 22, 1981, six months prior to the incident, the Crosses sold the defendant Baxter Brown approximately five acres of their property fronting on Westover Road (T 53-55). Colonial's thirty foot right-of-way traverses Brown's five acre parcel, a fact set forth in Brown's title certificate (Ex. 4, 5, T 73).

In 1982, Brown, who owns and operates a realty company in Albany, took steps to develop his parcel (T 41, 42, 76). He hired the defendant Malcolm Burnsed, a registered land surveyor, to survey the parcel and prepare a grading plan (T 61-63, Ex. 2, T 78-82, Ex. 7). In May 1982, Brown hired Wright Contracting Co., an excavating contractor, to perform the grading in conformity with Burnsed's grading plan, and on or about May 28, Wright Contracting Co. began the grading (Ex. 9, T 90, Ex. 42, T 28). Wright's contract with Brown provided that utilities in the work area would be removed by someone other than Wright and that Wright would not be responsible for damage to such utilities (Ex. 9). After over two weeks on the site, on June 15, 1982, Wright's bulldozer punctured the pipeline (T 582-584).

At no time prior to the rupture was Colonial notified of Brown's development plans or of Wright's grading activities. Wright admitted that, if it had notified Colonial, Colonial would have assisted Wright in locating the pipeline (T 552). Although Wright Contracting Co. knew that the pipeline was in the area, Wright did nothing to ascertain its actual whereabouts. Wright, as well as Colonial's co-defendants, could have discovered the existence of Colonial's pipeline by examining the Dougherty County land records (T 353), the title certificate issued to Baxter Brown (T 69-74), or previous surveys of the property prepared for the Crosses (T 446-447), or by asking R.W. Cross, Brown's neighbor and predecessor in title (T 95-97).

After Colonial's motions for directed verdicts were overruled (App. A-24 and A-26), the jury returned its verdict on July 23, 1986, in favor of the defendants Baxter Brown and Malcolm

Burnsed, and against Colonial in favor of Wright Contracting Co. in the amount of $52,728.46 actual damages to the bulldozer, $304.75 for consequential damages, and $5,000,000.00 in punitive damages (T 1299, R 164). Thereafter, Colonial's motions for judgment notwithstanding the verdict and for new trial were overruled by the trial court (App. A-32), and a timely appeal was taken to the seven member Supreme Court of Georgia, which had jurisdiction by virtue of the constitutional questions raised as to O.C.G.A. § 51-12-5. Ga. Const. 1983, Art. VI, Sec. VI, Par. II (1).

A three-Justice plurality of the Supreme Court of Georgia (App. A-1) held that punitive damages constitute fines and that the $5,000,000.00 punitive damage award against Colonial was an excessive fine in violation of Georgia's equivalent of the Eighth Amendment to the Constitution of the United States, to wit: Ga. Const. 1983, Art. I, Sec. I, Par. XVII.[6]

One Justice concurred in the judgment reversing the award of punitive damages (App. A-12), not on the basis of Georgia's Constitution, but on the basis that (i) unless otherwise provided by law, under another provision of Georgia law, O.C.G.A. § 13-6-10 (1982), punitive damages are not allowed in cases "arising on contracts", (ii) there was heavy emphasis at trial upon Colonial's breach of its agreement with the Crosses to bury the pipeline below the grade of Westover Road, and (iii) the trial court failed to instruct the jury that punitive damages could not be allowed in cases "arising on contracts", i.e., could not be allowed in this case if the jury found Colonial liable solely on the basis that Colonial breached the agreement to bury the pipeline at a prescribed depth.

Thus, a majority of four Justices voted to reverse the punitive damages award, resulting in the necessity for a new trial as to such damages.

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[6] These three Justices stated in footnote 2: "Because we are reversing this case under the excessive fines clause of the Ga. Constitution, Art. I, Sec. I, Par. XVII, we are not going to address the due process argument." (App. A-5).

Three dissenting Justices (App. A-12) did not consider the $5,000,000.00 punitive damages award against Colonial to be excessive as a matter of law, and did not find it to violate state or U.S. constitutional prohibitions against deprivations of due process, denials of equal protection, or excessive fines.

As a consequence of the Supreme Court of Georgia's decision, Colonial must submit to a new trial as to punitive damages under a statute which, Colonial urges, violates the Fourteenth Amendment. In fact, retrial itself, appellant submits, will violate its constitutional rights.[7]

B. The Federal Questions Were Properly Presented

Colonial raised the Fourteenth Amendment Due Process Clause challenge to O.C.G.A. § 51-12-5, *supra*, before the trial court initially by a motion to dismiss the count of the complaint seeking punitive damages (App. A-21), which motion the trial court denied (App. A-23). It raised the Due Process and Equal Protection Clause questions by its motion for directed verdict disallowing punitive damages at the close of the plaintiff's case (App. A-24) and at the close of the evidence (App. A-25), which motions were overruled (App. A-24 and A-26), by its exception to the court's charge to the jury authorizing it to award punitive damages (App. A-27), and by its motion for judgment notwithstanding the verdict as to punitive damages (App. A-28), which also was denied by the trial court (App. A-32).

Thus, appellant's Fourteenth Amendment challenges to O.C.G.A. § 51-12-5, *supra*, were timely raised in the trial court and at every meaningful opportunity thereafter.

On appeal to the Supreme Court of Georgia, Colonial urged, *inter alia*, that the evidence was insufficient to support a verdict awarding punitive damages, and, second, that the $5,000,000.00 punitive damages award should be vacated under existing rules of

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[7]See footnote 3, above.

law as to excessiveness. Colonial's third enumeration of error was as follows:

> 3. The punitive damages statute of Georgia, O.C.G.A. § 51-12-5, is unconstitutional on its face, and in its application to Colonial in this case, and the verdict and judgment of $5,000,000.00 for punitive damages against Colonial is unconstitutional and void for the reasons that they deny Colonial due process and equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia, and that the statute permits, and the verdict and judgment constitute, an excessive fine in contravention of the Eighth Amendment to the Constitution of the United States and Article I, Section I, Paragraph XVII of the Georgia Constitution.[8]

Although the plurality opinion recites only that appellant raised the "due process" issue (App. A-4), the dissenting opinion acknowledges that appellant raised both the due process and equal protection issues (App. A-13). Neither the plurality nor the dissenters indicate whether those issues were raised under the Fourteenth Amendment or the state constitution, or both. However, appellee has not at any time contended that appellant's raising of the Fourteenth Amendment issues was either untimely or otherwise defective, and no Justice of the Georgia Supreme Court declined to reach the constitutional issues on the ground of procedural defect.

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[8](Footnote added.) Because the $5,000,000.00 punitive damages award was reversed by a plurality of the court below pursuant to Georgia's constitutional prohibition against excessive fines, appellant does not contend that such award should be reviewed by this Court under the Eighth Amendment to the Constitution of the United States. Appellant does contend, however, that the finding by the plurality that punitive damages constitute fines brings appellant's equal protection argument into clear focus. Moreover, appellant does contend that the failure of O.C.G.A. § 51-12-5 to contain any upper limit permits punitive damage awards to violate the Eighth Amendment.

The failure of the plurality opinion of the court below to expressly rule on appellant's Fourteenth Amendment due process and equal protection challenges to O.C.G.A. § 51-12-5 in no way defeats this Court's jurisdiction to decide the constitutionality of the statute which, by allowing retrial as to punitive damages, the plurality below necessarily found to be valid as against appellant's Fourteenth Amendment challenges. *See Lawrence v. State Tax Comm'r.*, and *Bankers Life v. Crenshaw*, *supra* note 1.

Appellant renewed its Fourteenth Amendment due process and equal protection objections to O.C.G.A. § 51-12-5 in its Motion for Rehearing timely made in the Supreme Court of Georgia (App. A-33), to no avail (App. A-18).

Thus, appellant raised and renewed its Fourteenth Amendment Due Process and Equal Protection Clause challenges to the Georgia statute authorizing awards of punitive damages, O.C.G.A. § 51-12-5, in a timely manner and at every meaningful opportunity thereafter, in the trial court and in the Supreme Court of Georgia. Appellant can do no more. Certainly, appellant cannot compel the Supreme Court of Georgia to set forth expressly in its opinion that it is overruling appellant's Fourteenth Amendment due process and equal protection attacks upon the statute. The constitutional questions were properly presented.

C. The Questions Presented Are Substantial.

Before considering the applicability of the Due Process and Equal Protection Clauses, a brief analysis of the statute here in issue is warranted. O.C.G.A. § 51-12-5 authorizes punitive damages in a tort action of any type, and is the only statutory authority for general punitive damages in Georgia. It provides as follows:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.[9]

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[9](Footnote added.) Wright Contracting Co., a corporation, cannot recover damages for "wounded feelings". Therefore, punitive damages

Thus, under this authority, a jury is authorized to award punitive damages in any tort case "in which there are aggravating circumstances, in either the act or the intention". Recognizing that the phrase "aggravating circumstances, in either the act or the intention" is vague and indefinite, the Georgia court's have sought to provide some additional specificity and have, in effect, defined "aggravating circumstances" as willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 148-149, 45 S.E. 1000 (1903); *Kaplan v. Sanders*, 237 Ga. 132, 134, 227 S.E.2d 38, 39 (1976); *General Refractories Co. v. Rogers*, 240 Ga. 228, 230, 239 S.E.2d 795, 798 (1977).

However, these additional words are themselves vague and indefinite. For example, in a tort suit based upon fraud, certainly the trial judge would be required to define "fraud" for the jury. Similarly, in suits involving alleged willful misconduct, malice, wantonness, etc., those terms would not be considered to be self-explanatory, and further clarification would be required.[10]

Moreover, the clarity and specificity of the words or phrases attempting to clarify the phrase "aggravating circumstances" is limited by the least clear and least specific of such words or phrases, and the phrase "that entire want of care which would raise the presumption of a conscious indifference to consequences" is most unclear and indefinite. It was that supposedly clarifying expression which was directly involved here, as shown by the trial court's charge to the jury (T. 1248). Unlike the words "willful misconduct", which connote some intentional affirmative, yet unacceptable act, the words "entire want of care" may connote nothing more than a failure to act, which failure may be a

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would be allowable here under the statute for deterrence only. However, insofar as deterrence was concerned, no evidence was introduced to show defendant's financial status or condition.

[10]For example, " 'Malice' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings." *Smith v. Wade*, 461 U.S. 30, 39 fn. 8 (1983). The passage of time has not clarified the definition of malice.

general failure to take any action to prevent an occurrence (an "across the board" failure to act, so to speak), or may be a failure to take any action to prevent the particular cause of an occurrence (a complete, yet particularized, failure to act). Neither the statute nor the cases resolves this ambiguity.

We turn now to the requirements of the Fourteenth Amendment applicable to the punitive damages statute.

1. The Punitive Damages Statute Denies Defendants Due Process of Law.

Damages and penalties imposed by state laws, including civil laws, may be invalid as deprivations of property without due process of law. *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915).[11]

Georgia's punitive damages statute, O.C.G.A. § 51-12-5, *supra*, violates the Due Process Clause in each of the following specific ways, among others:

(a) It fails, as do the court decisions interpreting it, to notify people (who are later to become defendants) of the nature of the offenses for which they may be liable in punitive damages, and it fails to limit the award of punitive damages to criminal, or even intentional, behavior;

(b) It likewise fails, as do the court decisions interpreting it, to inform judges and juries of the nature of the offenses for which punitive damages may be awarded;

(c) It fails, as do the court decisions interpreting it, to inform judges and juries as to any means of calculating or determining the amount of such punitive damages as are to be awarded, whether by reference to the actual damages or otherwise;

(d) It fails to place any ascertainable or meaningful limit upon the amount of punitive damages to be awarded;

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[11] In *Missouri Pac. v. Tucker*, *supra*, the Court set aside a $500 penalty as arbitrary and oppressive.

(e) It allows persons to be put in jeopardy of repeatedly paying punitive damages for the same offense;

(f) To the extent that awards of punitive damages are criminal in nature, or quasi-criminal, they are awarded upon proof not beyond a reasonable doubt but by a mere preponderance of the evidence, contrary to the requirements of due process of law; and

(g) Being without guidelines or criteria for determining imposition or measurement of punitive damages, as well as being without limitation thereon, it permits awards of excessive punitive damages without relationship to the public safety, health or welfare sought to be served by the allowance of punitive damages; i.e., the statute permits "overkill" ("overdeterrence") far beyond the state's police power requirements.

Considered separately and cumulatively, the foregoing statutory failures render the punitive damages statute invalid.

As this Court noted in *Musser v. Utah*, 333 U.S. 95, 97 (1948): "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *See also Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964).

Although the foregoing decisions involved criminal laws, the due process requirement of reasonable certainty in fixing a standard of obedience in advance applies to civil as well as criminal legislation. *Cline v. Frink Dairy Co., supra*, 274 U.S. at 463, citing *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 238 (1925).[12]

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[12]A state law which deprives a person of property without due process of law would violate the Due Process Clause whether that state law be criminal, or civil, or hybrid. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

So too, vague penalty provisions pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given statute. *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483 (1948). Certainly, then, a law which fails to inform judges and juries as to the proper means of calculating or determining the amount of punitive damages to be awarded (whether by reference to the actual or compensatory damages incurred, the defendant's ability to pay, or some other measure of damages), [13] and which fails to inform judges and juries as to the maximum punitive damages which may be imposed,[14] is a violation of due process.

Regarding criminal law, the prohibition against double jeopardy is fundamental. *Benton v. Maryland*, 395 U.S. 784, 794-796 (1969). So too, due process should prohibit a person from being required to pay punitive damages more than once for the same act, such as manufacturers of defective products may be required to do, such as defendants in mass tort situations may be required to do, and such as Colonial might have been required to do if the personal injury and wrongful death actions of Wright's bulldozer operator had gone to trial.

Finally, the award of punitive damages against Colonial was determined by the preponderance of the evidence (T. 1226), while due process requires that a violator's guilt be proven beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970).

The court below has recognized that "Our cases on punitive damages do not present clear guidelines to follow . . . ." *General Refractories Co. v. Rogers*, 240 Ga. 228, 233-234, 239 S.E.2d 795, 800 (1977). A majority of this Court has noted that the standards on which punitive damages are based may be (as they are in Georgia) "ill-defined." Justice Brennan in his dissent in

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[13]In Georgia, the "measure" of punitive damages is "the enlightened conscience of an impartial jury." *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279, 30 S.E.2d 662, 664 (1944).

[14]In Georgia, the only statutory limit on punitive damages is that such damages may not be "so excessive as to justify the inference of gross mistake or undue bias." O.C.G.A. § 51-12-12 (1982).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 n. 4 (1985), joined by Justices Marshall, Blackmon and Stevens, quoting then Justice Rehnquist's dissent in *Smith v. Wade*, 461 U.S. 30, 59 (1983).

The statute here in issue fails to set forth any clear standard or criterion for the jury to apply in determining whether to award punitive damages, and if so, the amount. It simply leaves to the unbridled judgment of a random jury, what to give and whether to give it. Each award of punitive damages therefore represents not a governmental decision but an award that speaks to the conscience of a particular jury with no uniformity, thus permitting awards under the same or similar circumstances to vary widely and wildly in amount, according to the arbitrary notions of one particular group of people. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("Consequently, juries assess punitive damages in wholly unpredictable amounts . . . ."); *Smith v. Wade, supra*, 461 U.S. at 59 (Rehnquist, J. dissenting) ("punitive damages are frequently based upon the caprice and prejudice of the jurors."); and *International Brotherhood of Electricial Workers v. Foust*, 442 U.S. 42, 50 (1979) ("[T]he impact of these windfall recoveries is unpredictable and potentially substantial").[15]

Punitive damages as allowed by O.C.G.A. § 51-12-5, *supra*, are inconsistent in every respect with the requirements of due process, substantive and procedural. That statute has permitted and will permit the arbitrary confiscation and transfer of Colonial's property to Wright Contracting Co., over and above Wright's actual damages, without advance notice of the conduct to be avoided, pursuant to a vague and indefinite statute which does not give notice to Colonial or Colonial's jury of the conduct to be penal-

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[15]"Moreover, because such damages [non-economic damages, such as mental anguish and punitive damages] are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results." Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, p. 66 (1986) (matter in brackets added).

ized, and which does not limit the penalty to be imposed, upon a mere preponderance of the evidence and the whim and caprice of a jury left to its own devices without guidelines, guidance or bounds established legislatively or judicially to promote or protect the public's safety, health or welfare. Under these circumstances, "The plaintiff's position is analogous to that of the prosecuting attorney whose pay is determined by the number of convictions he is able to secure." Morris, "Punitive Damages in Tort Cases", XLIV Harv. L. Rev. 1173 (1931).

In the recent decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Court noted, but did not reach, the substantial nature of the due process issue raised again here, saying (475 U.S. at , 106 S.Ct. at 1589):

> Appellant also argues ... that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment .... These arguments raise important issues which, in an appropriate setting, must be resolved ....

In the even more recent decision in *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (No. 85-1765, decided May 16, 1988), the Court had noted probable jurisdiction in a case apparently involving the due process issue but was not able to reach this issue. Nevertheless, in a concurring opinion, Justice O'Connor noted that, in an appropriate case, "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits." 56 U.S.L.W. at 4423.

The case at bar presents these important issues squarely, and these issues are the only ones presented. Having recognized the problems, the Court should resolve them without extended delay.

2. The Punitive Damages Statute Denies Defendants Equal Protection of the Laws.

At the outset it should be noted that the intent and purpose of punitive damages, sometimes called "exemplary" damages, is to punish and penalize the offender, regardless of the name by which such damages are called. That is to say, punitive damages extracted from a civil litigant serve the same purpose as a fine

imposed upon a criminal defendant, to-wit: punishment.[16] To say that the purpose of punitive damages is deterrence, not punishment, is to engage in semantics. Deterrence may be the objective, but punishment is the means to obtain that objective.

Punitive damages have been described as "private fines levied by civil juries . . . ." *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 350. Regardless of whether such "fines" are "public" or "private," they are "fines". This is particularly so in Georgia where a plurality of the court below found such fines to be subject to Georgia's constitutional prohibition against "excessive fines". Ga. Const. 1983, Art. I, Sec. I, Par. XVII.

Whether civil or criminal, punitive damages are fines and hence should be treated for equal protection purposes as being in the same category or classification as fines imposed by statutes in criminal cases.

Therefore, the statute in issue has denied, and on retrial will again deny, Colonial equal protection of the laws because it provides fewer protections for private litigants in tort suits than our criminal laws provide persons accused of crimes. That is to say, comparing defendants in criminal cases liable for fines and defendants in civil cases liable for punitive damages (fines), the latter are denied equal protection of the laws because the former are afforded the protections of the criminal laws not afforded civil litigants, such as advance notice of the nature of the offenses for which they may be punished and the consequent certainty that judges and juries will be informed of the nature of the offenses for which punitive damages may be imposed. Defendants in criminal cases also have the protection of a statutory limitation upon the amount of fine which may be imposed, and protection against double jeopardy. Moreover, persons charged with crimes may not be convicted unless they are found guilty beyond a reasonable doubt, which is a substantially higher burden of proof than that which was and will be imposed by the trial court in the instant case, the simple preponderance of the evidence standard. Civil

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[16]Punitive damages ". . . serve the same function as criminal penalties . . ." *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 82 (1971) (Marshall, J., dissenting).

defendants subject to punitive damage awards are denied these and other fundamental protections.[17]

As the Chief Justice noted in his dissenting opinion in *Smith v. Wade*, *supra*, 461 U.S. at 59, punitive damages are "unaccompanied by the types of safeguards present in criminal proceedings." The denial of these safeguards under an open ended punitive damage statute is not rationally related to a legitimate state interest.

Therefore, the fines imposed as punitive damages in civil cases deprive civil defendants of the equal protection of the laws afforded criminal defendants, and the statute in issue should be declared unconstitutional for this additional reason.

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[17]To the extent that punitive damages are imposed based upon a defendant's financial status, an additional equal protection violation occurs.

CONCLUSION

Appellant's constitutional claims are substantial. It has already been fined in an amount vastly out of proportion to the actual damages it was found to have caused and now faces retrial. Its retrial will be conducted in violation of the Constitution and its punishment will be imposed without any of the safeguards or protections that due process and equal protection require.

Appellant has raised its Fourteenth Amendment challenges to the statute at every meaningful opportunity during this litigation. Because these challenges raise important issues, probable jurisdiction should be noted and this case should be briefed and set for oral argument.

June 8, 1988

Respectfully submitted,

*HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

*Counsel of Record

Of Counsel:

ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326

JAMES V. DAVIS
RICHARD D. HALL
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702

EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303

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Decided: March 17, 1988

In the Supreme Court of Georgia

44925. COLONIAL PIPELINE COMPANY v. BROWN et al.
44926. COLONIAL PIPELINE COMPANY v. WRIGHT CONTRACTING COMPANY et al.

SMITH, Justice.

This appeal consolidates two related cases stemming from the destruction of a bulldozer after it hit and ruptured Colonial Pipeline's underground petroleum pipeline. The owner of the bulldozer, Wright Contracting Company, sued Colonial, Baxter Brown, the real estate developer who hired Wright to do grading work, and Malcolm Burnsed, the surveyor who did the grading plan.

Case No. 44925 is Colonial's appeal from a jury verdict requiring Colonial to indemnify Brown for his expenses incurred in defending this lawsuit. We affirm case No. 44925.

Case No. 44926 is Colonial's appeal from a jury verdict awarding Wright $52,728.46 actual damages, $304.75 consequential damages and $5,000,000 punitive damages. We affirm in part and reverse in part case No. 44926 — the punitive damages award is reversed.

Colonial purchased a right-of-way easement from Reese W. Cross and Eloise H. Cross in 1976. Colonial's pipeline was to be installed on part of their property that faced Westover Road, and it was to run parallel to the road. The property subject to the easement was higher than the road, and the easement required Colonial to bury the pipeline at least thirty inches below the grade of Westover Road.

Baxter Brown, an experienced real estate broker, purchased five acres of land out of a larger parcel owned by the Crosses. The five acres Mr. Brown purchased were subject to Colonial's recorded easement.

Mr. Brown hired Malcolm Burnsed, a registered land surveyor, to survey the property and prepare a boundary line survey and a grading plan.

Although a preliminary title opinion was prepared four days prior to the purchase of the property in December 1981, Mr. Brown asserted that he had not seen it prior to the date the pipeline was ruptured on June 15, 1982. Both the preliminary title opinion and the final title opinion contained identical language: "Right-of-way easement from REESE WILSON CROSS and ELOISE HUCKABEE CROSS to COLONIAL PIPELINE COMPANY, A DELAWARE CORPORATION, dated August 26, 1976, and recorded in Deed Book 568, pages 329-330, in the aforesaid Clerk's Office."

Neither the boundary line survey nor the grading plan prepared by Mr. Burnsed contained a hint of Colonial's easement. Mr. Burnsed found a warranty deed dated 1966 from L. W. Cross to R. W. Cross in the court records. Because the deed stated that it was "[s]ubject to easements of record," Mr. Burnsed used the grantor/grantee index to determine if there was an easement prior to 1966. He testified that he had looked at the property and did not see any physical evidence of a pipeline, therefore, he had no reason to check to see if an easement had been conveyed after 1966. Mr. Burnsed testified that he did not know that the pipeline was under the property he had surveyed until the pipeline was ruptured.

Mr. Burnsed testified that he did not obtain a copy of the title opinion in preparing his boundary line survey and admitted that the Rules of State Board of Registration for Professional Engineers and Land Surveyors, Section 180-7-.02 provides: "The surveyor prior to making [a boundary line survey] shall acquire all necessary data, including deeds, maps, *certificates of title*. . . ." (Emphasis supplied.)

David James, the area manager for Wright Contracting Company, testified that he did not see any evidence of the pipeline on the property that Wright was hired to grade. He further testified that he did not see the Colonial Pipeline marker that was located 670 feet south of the property. He did indicate that he knew that

the pipeline was in the area, but he did not know that it was under the property.

Mr. James stated that if he had known about the pipeline he would not have relied upon the terms of the easement, he would have called Colonial and they would have located the pipeline for him.

The Wright Contracting Company "Safety Rules Procedure" manual provides in part: "Construction Practices . . . *Excavating and Trenching* operations will include proper safeguards and inspections to *determine location and extent of underground utilities*. . . ." (Emphasis supplied.)

An expert witness, Mr. John Sperry, testified that if he were going to cut a five acre tract out of a larger tract and provide a boundary line survey, he would look *forward* from the 1966 deed to see if any parcels or easements had been deeded out of the property. [If the surveyor had looked forward, he would have found the easement.] In answer to another question, Mr. Sperry testified that if he was hired to do a grade plan and topographical survey that he would ask for the title opinion. [If the surveyor had obtained the title opinion he would have found the easement.] Mr. Sperry indicated that there is no difficulty in securing a map from Colonial Pipeline that shows the location of the pipeline. He testified that the general standards by which one should conform as a surveyor are in Section 180-7-.02 of the Rules of State Board of Registration for Professional Engineers and Land Surveyors.

The bulldozer operator was grading between eight and nine inches below the level specified in the grading plan when the pipeline was ruptured.

Federal regulations require Colonial to conduct an aerial inspection of the entire pipeline every fourteen days to discover unusual activities. Colonial had contracted with a new aerial patrol contractor on May 1, 1982. He had difficulty finding the line from the air; as a result, only two partial inspections were conducted in the fourteen days preceding the occurrence. The red clay field where Wright was grading was observed by a

Colonial employee on a June 11, 1982 flight, but he assumed the activity was farming and failed to report it.

The pipeline was installed approximately 48 inches below the surface of the land; however, it was approximately one and three-quarter inches above the center of Westover Road. Although a marker was located 1,120 feet south of the ruptured line and 670 feet south of the property line and another 2,245 feet north of the rupture at the intersection of Old Dawson Road and Westover Road, there were no markers on the property at the time of the rupture. The distance between the two markers was 3,358 feet. Federal law requires, "[e]ach operator shall place and maintain line markers over each buried line in accordance with the following: (1) Markers must be located at each public road crossing, at each railroad crossing and in sufficient number along the remainder of each buried line so that the location is accurately known."

There was also evidence that six years earlier another construction worker had hit a portion of the pipeline that was on property that was unmarked, but there were no damages.

The jury's verdict exonerated Mr. Brown and Mr. Burnsed and awarded Wright $52,728.46 actual damages, $304.75 consequential damages, and $5,000,000 punitive damages.

1. The section of the pipeline ruptured by Wright's bulldozer was located on the property of appellee Baxter Brown.[1]

2. The appeal of the punitive damages award raises several issues. One is whether or not the complaint sounds in contract or tort. We hold that it sounds in tort, and inasmuch as we are reversing on the punitive damages phase of the case, we will not go into detail as to that point.

3. Colonial challenges the punitive damages element of this case on two grounds, due process and the Eighth Amendment prohibition against excessive fines contending that this prohibition

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1. The jury found that the rupture occurred on Mr. Brown's land, and Colonial appeals this finding. Conflicting evidence was presented as to the location of the rupture. Since the record reflects sufficient evidence to support the jury's finding, we will not overturn it.

applies to civil as well as criminal cases. Colonial then asserts that five million dollars in punitive damages violates this amendment.[2]

a. *Ingraham v. Wright*, 430 U.S. 651 (97 SC 1401, 51 LE2d 711) (1977), has been relied upon to find that the Eighth Amendment does not apply to civil cases. But, *Ingraham* dealt only with the cruel and unusual punishment clause of the Eighth Amendment, it did not concern the excessive fines clause. It cannot be viewed as excluding punitive damages from scrutiny under the excessive fines clause of the Eighth Amendment. Moreover, even if *Ingraham* had held that the Eighth Amendment of the United States Constitution applied only to criminal cases, there would be nothing to prevent the application of the excessive fines clause of Art. I, Sec. I, Par. XVII of the 1983 Georgia Constitution to civil cases, thereby affording greater protection under state law.

Justice White writing for the dissent in *Ingraham* stated, "[t]he Court would have us believe . . . that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong." Id., 687. Justice White cited *Trop v. Dulles*, 356 U.S. 86 (95 SC 590, 2 LE2d 630) (1958) (plurality opinion), for the appropriate test: "The relevant inquiry is not whether the offenses for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence." *Ingraham*, supra, 430 U.S. at 687-88 (White, J., dissenting).

b. Punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (94 SC 2997, 41 LE2d 789) (1974). In Georgia, when the tortious conduct amounts to "wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences[,]"

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2. Because we are reversing this case under the excessive fines clause of the Ga. Constitution, Art. I, Sec. I Par. XVII, we are not going to address the due process argument.

punitive damages are allowed pursuant to OCGA § 51-12-5 to deter the wrongdoer from repeating his wrongful acts. *Southern Railway Co. v. O'Bryan*, 119 Ga. 147 (45 SE 1000) (1903); *Moore v. Thompson*, 255 Ga. 236, 237 (336 S.E.2d 749) (1985). Punitive damages cannot be imposed without a finding of some form of culpable conduct. Negligence, even gross negligence, is inadequate to support a punitive damage award. *Southern Railway Co.*, supra. Punitive damages, although civil in nature, nonetheless serve the criminal law goal of deterrence rather than the traditional compensatory goal of civil law.

c. "The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Ingraham*, supra, at 670-71 n. 39. A review of the history of the excessive fines clause of the Eighth Amendment indicates that it has an origin that was not limited to criminal cases.[3] See Jeffries, J., "A Comment on the Constitutionality of Punitive Damages," 2 Va. L. Rev. 139 (1986); Massey, C., "The Excessive Fines Clause and Punitive Damages: Some Lessons From History," 40 Vanderbilt L. R. 1234 (1987).

Prior to 1215 a system developed whereby a monetary penalty was demanded from one who engaged in either criminal or civil misconduct. The penalty was called an "amercement." The

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3. "[T]he constitutional prohibition is against cruel and unusual *punishments*; nowhere is that prohibition limited or modified by the language of the Constitution." *Ingraham*, 430 U.S. at 686 (White, J., dissenting.) (Emphasis in original.) In comparing the Eighth Amendment with other Amendments of the United States Constitution, we note that the others include limitations. The Fifth Amendment provides, "No person shall be held to answer to a capital, or otherwise infamous *crime* . . . nor shall he be compelled in any *criminal* case to be a witness against himself . . . ." The Sixth Amendment states, "In all *criminal* prosecutions . . . ." In light of the fact that the Eighth Amendment was placed between the Seventh Amendment which provides for trial by jury in *civil* cases and the Ninth Amendment which is a reservation of rights of the people, the absence of any language limiting the Eighth Amendment to criminal cases is especially noticeable. The Georgia Constitution was patterned after the United States Constitution.

amercement was not levied according to any fixed schedule but was imposed arbitrarily at the discretion of the court. Abuses in the use of "amercements" flourished. The abuses were so pervasive that a great deal of space was devoted to them in the Magna Carta.[4] "Chapter 20 of the Great Charter, the king was made to concede that: A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his 'contenement;' and a merchant in the same way, saving his 'merchandise;' and a villein shall be amerced in the same way, saving his 'wainage' — if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood." *Jeffries*, supra, at 155.

"From these three provision [sic] of Magna Carta, two related protections emerge. First, there is a requirement of reasonableness, of proportionality, of sensible relation between punishment and offense. Second, the penalty inflicted should not, in any event, destroy the offender's means of making a living in his particular trade or calling. Magna Carta guaranteed not just bare survival, but continued productive economic viability." Id., at 156.

The United States Constitution as originally submitted to the states was criticized for its failure to include a declaration of rights. "Magna Carta and the English Bill of Rights were invoked as models of what was required, and a tacit understanding was reached that some such provisions would be added by way of amendment." Id., at 156. "The Eighth Amendment was based

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4. "Whatever retrospective characterization one might choose, at the time amercements were not distinctly criminal in nature. This is made abundantly clear by Blackstone who asserted that '[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehavior in matters of civil right.' 4 W. Blackstone, Commentaries *372. In this statement, Blackstone consciously distinguished between civil and criminal and correctly identified amercements as a form of civil punishment." *Jeffries*, supra, at 155, n. 65.

directly on Art. I, Sec. 9, of the Virginia Declaration of Rights (1776) ... [which] in turn ... adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen." *Solem v. Helm*, 463 U.S. 277, 285-86 n. 10 (103 SC 3001, 77 LEd2 637) (1982).

d. We hold that the excessive fines clause of Art. I, Sec. I, Par. XVII of the Georgia Constitution applies to the imposition of punitive damages in civil cases because "the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence[,]" *Ingraham*, supra, 430 U.S. at 687-88 (White, J., dissenting.), and because the Eighth Amendment excessive fines clause of the United States Constitution was intended as a protection from all excessive monetary penalties.

4. In order to decide what fines are excessive under the excessive fines clauses of the Georgia Constitution, Art. I, Sec. I, Par. XVII, a look into the history of torts is necessary.

"Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. L. Prosser and W. P. Keeton, *Prosser & Keeton, Handbook on the Law of Torts*, p. 2 (5th ed., 1984).

"In the early English law, after the Norman conquest, remedies for wrongs were dependent upon the issuance of writs to bring the defendant into court. In the course of the thirteenth century the principle was established that no one could bring an action in the King's common law courts without the King's writ. As a result of the jealous insistence of the nobles and others upon the prerogatives of their local courts, the number of writs which the King could issue was limited, and their forms were strictly prescribed. There were, in other words, 'forms of action,' and unless the plaintiff's claim could be fitted into the form of some established and recognized writ, he was without a remedy in the King's courts. The result was a highly formalized system of procedure, which governed and controlled the law as to the substance of the wrongs which might be remedied.

"The writs which were available for remedies that were purely tortious in character were two — the writ of trespass, and the writ of trespass on the case.

"The form of action in trespass had originally a criminal character. It would lie only in cases of forcible breaches of the King's peace, and it was only on this basis that the royal courts assumed jurisdiction over the wrong. The purpose of the remedy was at first primarily that of punishment of the crime; but to this there was added later the satisfaction of the injured party's claim for redress. If the defendant was found guilty, damages were awarded to the successful plaintiff, and the defendant was imprisoned, and allowed to purchase his release by payment of a fine. What similarity remains between tort and crime is to be traced to this common beginning. See Woodbine, The Origin of the Action of Trespass (1923) 33 Yale L.J. 799, (1934) 34 Yale L.J. 343; Maitland, The Forms of Action at Common Law (1941) 65." W. L. Prosser, *Cases and Materials on Torts*, p. 2 (6th ed., 1976).

"Originally the two remedies [criminal and tort] were administered by the same court, and in the same action. Tort damages were at first awarded to the injured individual as an incident to a criminal prosecution; and as late as 1694 the defendant to a writ of trespass was still theoretically liable to a criminal fine and imprisonment. Because of this common origin, it is not unusual for a tort and a crime to bear the same name, such as 'assault,' 'battery,' 'trespass,' or 'libel,' and often enough such terms will refer to the same conduct. But tort and criminal law have developed along different lines, with different ends in view, and so it does not necessarily follow that the term has the same meaning in both. Thus it is entirely possible that an act may be a tort, but not a crime of the same name, or that it may amount to the crime and not the tort. . . .

"The idea of punishment, or of discouraging other offenses, usually does not enter into tort law, except in so far as it may lead the courts to weigh the scales somewhat in favor of the plaintiff's interests in determining that a tort has been committed in the first place. In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and

deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action 'punitive' or 'exemplary' damages, or what is sometimes called 'smart money.' Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. . . .

"Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as 'gross,' a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

"Typical of the torts for which such damages may be awarded are assault and battery, libel and slander, deceit, seduction, alienation of affections, malicious prosecution, and intentional interferences with property such as trespass, private nuisance, and conversion. *But it is not so much the particular tort committed as the defendant's motives and conduct in committing it which will be important as the basis of the award.*" W. L. Prosser and W. P. Keeton, supra, pp. 8-11. (Citations omitted and emphasis supplied).

Thus, it can be seen that the tort law grew out of the criminal law and as such retains some of the elements thereof, to-wit, punitive damages. The word punitive means to inflict punishment.

5. The statute in Georgia that allows an assessment of punitive damages is OCGA § 51-12-5. This statute authorizes a jury to

award additional damages to "deter the wrongdoer from repeating the trespass" — the basis upon which the award was made in this case. The code section states that in every tort there may be aggravating circumstances, either in "the act or the intention" in which event additional or punitive damages may be awarded.

In a punitive damage case, the trier of fact must determine: First, was a personal injury or death involved or mere damage to property; and second, was the negligence active or passive. The next step in the determination as to whether punitive damages should be awarded is to decide if there was any evidence of wilful misconduct, malice, fraud, wantonness or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. *Southern Railway Co. v. O'Bryan*, supra, at p. 147.

This case involved personal property damage only. The bulldozer was in an open field, not near any building or residence, and there was no bodily injury to this plaintiff. There was constructive notice to the landowner that Colonial's pipeline was under his property. The surveyor failed to discover the recorded easement, and the bulldozer operator was grading approximately eight or nine inches below the level specified in the grading plan when the pipeline was ruptured. The punitive damages awarded are approximately one hundred times the total of actual and consequential damages.

6. The trial court erred in denying the motion for new trial as to punitive damages. We, therefore, reverse the $5,000,000 award as being excessive because (1) any negligence present was passive; (2) there was no bodily injury to this plaintiff, and the award does not bear a rationale relationship to the actual damages award; (3) there is no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award.

Case No. 44925. Judgment affirmed. All the Justices concur. Case No. 44926. Judgment affirmed in part and reversed in part. All the Justices concur, except Weltner, J., who concurs specially and Clarke, P. J., Gregory and Hunt, J. J., who dissent as to the reversal of punitive damages.

WELTNER, Justice, concurring specially.

I concur in the judgment affirming Case No. 44925, and in the judgment reversing the award of punitive damages in Case No. 44926. However, I believe that such a result properly is reached without considering the scope of our state constitution's prohibition of unusual punishments.

The rationale of the opinion is based upon its conclusion that the case "sounds in tort." (Opinion, p. 6.) With that I disagree, in view of the heavy emphasis placed at trial upon the breach by Colonial of its agreement to bury the pipeline at a certain depth. *That* aspect of the claim is, in my opinion, one "arising on contracts" within the meaning of OCGA § 13-6-10. Accordingly, and notwithstanding other particulars of negligence, it cannot support an award for exemplary damages because of the express prohibition contained in the code section.

While the charge in this case reflects a commendable comprehensiveness, it nonetheless failed to advise the jury as to this critically important prohibition. There being an adequate exception to the charge on punitive damages, it is my opinion that a new trial should be ordered on that ground.

CLARKE, Presiding Justice, dissenting.

I concur in the holding of the majority in its affirmance in case number 44925 concerning indemnification and with that part of the majority's holding in case number 44926 relating to actual damages and consequential damages. However, I respectfully dissent to the holding of the plurality of the court and to Justice Weltner's concurring opinion in case number 44926 as it relates to punitive damages. In my opinion, the award of punitive damages by the jury in this case is authorized by law.

In its appeal of the punitive damage award, Colonial contends the punitive damage statute is unconstitutional, that punitive damages are not authorized in cases of passive negligence and that the award in this case is excessive. Neither the plurality opinion nor the concurring opinion reached all of these issues

because they found the case to turn on the issue of excessiveness. Because I believe the verdict is authorized by law, I will undertake to discuss each of Colonial's contentions.

(a) Colonial contends the punitive damage statute violates due process because of vagueness and indefiniteness in its notice to potential defendants and lack of guidelines for the jury in awarding damages. The Georgia statute is brief and forthright. It provides, "In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for wounded feelings of the plaintiff." OCGA § 51-12-5. We have held, "A civil statute will withstand an attack of vagueness or indefiniteness if it provides fair notice to those to whom the statute is directed and enables one to determine from the provisions of the act what the legislative intent was in enacting the act." *Bryan v. Georgia Public Service Commission*, 238 Ga. 572, 574 (234 SE2d 784) (1979). By this standard, the statute withstands Colonial's attack. The statute extends fair notice to all those who commit aggravated torts that they stand in danger of the assessment of additional damages. I would not find the legislative intent in the enactment of this statute beyond the understanding of persons of common intelligence.

(b) Colonial also contends OCGA § 51-12-5 violates the constitutional assurance of equal protection, and equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with a fundamental right or operates to the peculiar disadvantage of a suspect class. A suspect class is one which has been "... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (96 S.C. 2562, 2567) (1976). Colonial does not belong to a suspect class and none of Colonial's fundamental rights have been violated. Applying a less strict standard to Colonial as a non-member of a suspect class, no equal protection violation occurred.

(c) As I understand the plurality opinion, it predicates the reversal of the punitive damage award primarily on the excessive fines clause of the Eighth Amendment to the United States Constitution and of Art. I, Sec. I, Par. XVII of the 1983 Georgia Constitution. The opinion applies this clause to civil actions. I do not agree with this interpretation of the constitutional provision and I believe this places me in the company of courts who have made earlier visits to these issues. In my view, *Ingraham v. Wright*, 430 U.S. 551 (97 S.C. 1401, 51 LE2d 711) (1977), was simple and direct in its holding that the Eighth Amendment does not apply to civil cases. Logic supports this position. The Eighth Amendment exists as a protection of citizens against the acts of the national government and not acts of other citizens. The protection of the Eighth Amendment was broadened by the Fourteenth Amendment of the United States Constitution when it extended the protection to acts of the states. *United States v. Kizer*, 545 F.2d 467 (1977). It is difficult to believe that the plurality chooses to apply the Eighth Amendment to controversies between private parties. Furthermore, it has been held that the conviction of a crime must occur before a party becomes entitled to the protection of the prohibition against cruel and unusual punishment. *Hill v. State*, 119 Ga. App. 612 (168 SE2d 327) (1969).

(d) Colonial characterizes its negligence as passive and argues that punitive damages are not allowed for nonperformance of a duty to keep premises in repair. *Kaplan v. Sanders*, 237 Ga. 132 (227 SE2d 38) (1976). The plurality opinion without explanation refers to the negligence in this case as passive and itemizes this as a reason for finding the award excessive. I cannot agree for two reasons. First, the question of passiveness does not relate to the extent of the award, but only to its justification. Second, the record convinces me that the jury was authorized to find something more than passive negligence. Inflammable gas is an inherently dangerous substance, *Community Gas Company v. Williams*, 87 Ga. App. 68, 78 (73 SE2d 119) (1952), and due care must be exercised to prevent gas escaping where it might become ignited and cause a damaging explosion. *Bray v. Atlanta Gas Light Co.*, 46 Ga. App. 629 (168 SE 96) (1933). By coupling the above statements with the evidence in this case, I

come to the conclusion that the jury was authorized to find the negligence to be more than passive. The negotiating process leading to the execution and delivery of the easement made Colonial aware of the plans to grade and develop the land in question. Nevertheless, Colonial proceeded to install the pipeline at a depth more than 30 inches shallower than the parties had apparently agreed to be safe. Additionally, Colonial stood in violation of federal regulations for its failure to adequately mark the location of the pipeline and to conduct overflights. The jury generally has the right to determine questions of negligence and its determination will not be disturbed upon review except in plain and undisputable cases. *Bussey v. Dawson*, 224 Ga. 191 (160 SE2d 854) (1968). I do not believe this is one of those cases.

(e) There remains the question of whether punitive damages in this case are excessive as a matter of law. Five million dollars is a large sum of money. It far exceeds the limitations ($250,000.00) placed by the legislature upon awards for punitive damages in causes of actions arising on or after July 1, 1987. OCGA § 51-12-5.1. But the legislature specifically established an effective date for that statute. This then binds us to the law as it existed prior to July 1, 1987. "The question of damages is one for the jury; and the court should not interfere with the jury's discretion unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." OCGA § 51-12-12. We have held that the amount required to deter future acts depends on the facts of a particular case as determined by the enlightened conscience of an impartial jury. *Smith v. Milliken*, 247 Ga. 369 (276 SE2d 35) (1981). OCGA § 51-12-5, the law dealing with causes of action arising before July 1, 1987, does not authorize our disturbance of the jury verdict in this case.

The plurality opinion attempts to tie the size of a verdict for punitive damages to the compensable injury suffered by the plaintiff. This is a mistaken effort. Compensatory damages and punitive damages have different purposes and stand on different feet. The law authorizes compensatory damages in an attempt to make a damaged party whole. The law authorizes punitive damages to protect all members of the public from a recurrence of the act committed by the defendant. In allowing punitive

damages, the law looks not so much to a result of the act as to its egregiousness. The record in this case contains a photograph of the fire erupting from the ruptured pipeline. This photograph demonstrates the enormity of the dangers posed in an incident of this sort. It is indeed fortunate that the rupture and resulting explosion and fire occurred in an open field, but it could have just as well occurred in some other location involving numbers of people. It is against this possibility that punitive damages are imposed as a protecting shield for the public.

I am authorized to state that Gregory and Hunt, JJ., join in this dissent.

44925. COLONIAL PIPELINE COMPANY v. BROWN et al.

44926. COLONIAL PIPELINE COMPANY v. WRIGHT CONTRACTING COMPANY et al.

[3/30/88]

On Motion for Rehearing

The law of Georgia is that punitive damages are for the purpose of deterring the wrongdoer. Thus, to some degree, it is analogous to a criminal case. In criminal cases there must be a rational relationship between the offense and punishment. For example, one convicted of a misdemeanor would not be sentenced to life imprisonment.

It would be the better practice for the court to instruct the jury to set out the ground or grounds upon which they base their finding that punitive damages should be awarded. The court could easily prepare an interrogatory-type judgment whereby the jury could check off which one or more of the grounds as set out in *Southern Railway v. O'Bryan*, supra at p. 147, the defendant was guilty of violating whereby it called for assessing punitive damages against him. After determining which ground or grounds the defendant violated, then following the three criteria set out in the reversing paragraph above, they could arrive at the amount of punitive damages, if any, to be assessed.

IN THE SUPERIOR COURT FOR THE
COUNTY OF DOUGHERTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY, Plaintiff, vs. COLONIAL PIPELINE COMPANY, W. BAXTER BROWN AND MALCOLM BURNSED, Defendants.	CIVIL ACTION FILE NO. 83-V-518

JUDGMENT

[Filed July 23, 1986]

This action having come on for trial before the court and a jury, the Honorable Loring A. Gray, Jr. presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED that the plaintiff, Wright Contracting Company, recover of defendant, Colonial Pipeline Company, the sum of $52,728.46 in actual damages, $304.75 in consequential damages and $5,000,000.00 in punitive damages, together with interest thereon at the rate of 12% per annum as provided by law plus its costs and, it is

FURTHER ORDERED AND ADJUDGED that the plaintiff take nothing against defendant Baxter Brown and defendant Malcolm Burnsed. SO ORDERED, this the 23rd day of July, 1986.

/s/ LORING A. GRAY, JR.
Loring A. Gray, Jr., Judge

In The Supreme Court of Georgia

44926. COLONIAL PIPELINE COMPANY v. WRIGHT CONTRACTING COMPANY et al.

3/30/88

THE MOTIONS FOR REHEARING WERE DENIED TODAY.

CLARKE, P.J., GREGORY & HUNT, J.J., dissent as to appellee's. All the Justices concur as to appellant's.

SUPREME COURT OF GEORGIA

Atlanta, March 17, 1988

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

COLONIAL PIPELINE COMPANY V. WRIGHT CONTRACTING COMPANY ET AL.

This case before this court upon an appeal from the Superior Court of DOUGHERTY County and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed in part, reversed in part. Weltner, J., concurs specially, Clarke, P.J., Gregory and Hunt, JJ., dissent as to reversal of punitive damages.

IN THE SUPREME
COURT OF GEORGIA

COLONIAL PIPELINE COMPANY,
Appellant,
v.
WRIGHT CONTRACTING COMPANY,
Appellee.

CASE NO. 44926

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed May 25, 1988]

Notice is hereby given that Colonial Pipeline Company, the appellant above named, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of Georgia of March 17, 1988, affirming in part and reversing in part the judgment of the Superior Court of Dougherty County, Georgia, against appellant entered in this action on July 23, 1986; and

(b) The final order, issued by the Supreme Court of Georgia, overruling appellant's Motion for Rehearing, entered on March 30, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

By: /s/ HAROLD N. HILL, JR.
Harold N. Hill, Jr., P.C.

Attorney for Colonial Pipeline Company

IN THE SUPERIOR COURT FOR THE
COUNTY OF DOUGHERTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY, Plaintiff, vs. COLONIAL PIPELINE COMPANY, W. BAXTER BROWN AND MALCOLM BURNSED, Defendants.	CIVIL ACTION FILE NO. 83-V-518

MOTION OF DEFENDANT COLONIAL PIPELINE COMPANY TO DISMISS

[Filed April 25, 1986]

Defendant Colonial Pipeline Company moves, pursuant to its Second Defense, to dismiss Count III of the complaint and paragraph (c) of the prayer on the ground that the complaint fails to state a claim against the defendant Colonial Pipeline Company for punitive damages.

LANDAU, DAVIS AND FARKAS, P.C.

By: /s/ JAMES V. DAVIS
James V. Davis
Attorneys for Defendant
Colonial Pipeline Company

IN THE SUPERIOR COURT FOR THE
COUNTY OF DOUGHERTY
STATE OF GEORGIA

RENA M. WILSON, Individually and as Administratrix of the Estate of Raymond Monroe Wilson,

Plaintiff,

vs.

COLONIAL PIPELINE COMPANY, et al.,

Defendants.

CIVIL ACTION
NO. 84-V-030

WRIGHT CONTRACTING COMPANY,

Plaintiff,

vs.

COLONIAL PIPELINE COMPANY, et al.,

Defendants.

CIVIL ACTION
NO. 83-V-518

BRIEF OF COLONIAL PIPELINE COMPANY IN SUPPORT OF MOTIONS TO DISMISS

[Filed April 25, 1986]

Separate motions to dismiss have been filed by Colonial Pipeline Company in each of the above-captioned cases. In order to conserve the time and energy of the Court, and because the question raised by the motions is the same in each of the cases, defendant Colonial Pipeline Company submits this single brief.

It is the purpose of these motions to attack the statute providing for the recovery of punitive damages, O.C.G.A. § 51-12-5 (Georgia Code § 105-2002), on the ground that it denies the defendant Colonial Pipeline Company due process of the law as guaranteed by the Fourteenth and Fifth Amendments to the Constitution of the United States of America, and by Article 1,

Section 1, Paragraph 1, of the Constitution of Georgia of 1982 (Code § 2-101).

* * * *

Colonial Pipeline Company is confident that the evidence in these cases, if they go to trial, will exonerate it completely from any of the sort of conduct described in the complaints or in these code sections. However, we are dealing here with allegations in a complaint, and to the extent that the allegations are made, Colonial contends that the allowance of punitive damages under the circumstances alleged will be a denial of due process of the law to Colonial.

* * * *

The best indicator of the basic unfairness and unreasonableness of allowing punitive damages under the circumstances in this case is the wild conflagration of excessive punitive damage verdicts presently consuming the country, with its devastating impact on businesses and professions. Punitive damages are not forfeited to the state as a penalty, neither do they serve to compensate for a loss. They simply constitute an unjust enrichment to someone based on the variable and flighty fancies of a random jury. They serve no legitimate governmental purpose; that purpose is already served by the criminal statute. They are arbitrary, unreasonable, and contrary to notions of fundamental fairness, and they violate the due process clause of both the Federal and the State Constitutions.

Respectfully submitted,

By: /s/ JAMES V. DAVIS
James V. Davis,
Attorney for Defendant

IN THE SUPERIOR COURT FOR THE
COUNTY OF DOUGHERTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY, Plaintiff, vs. COLONIAL PIPELINE COMPANY, W. BAXTER BROWN AND MALCOLM BURNSED, Defendants.	CIVIL ACTION FILE NO. 83-V-518

ORDER

[Filed May 30, 1986]

Defendant Colonial Pipeline Company having moved the Court to dismiss Count III of the complaint and paragraph (c) of the prayer in the above-styled action on the ground that the complaint fails to state a claim against the Defendant Colonial Pipeline Company for punitive damages, it is

ORDERED, that the motion of the Defendant Colonial Pipeline Company is hereby denied.

This 30 day of May, 1986.

/s/ LORING A GRAY, JR.
LORING A. GRAY, JR.
Judge of Superior Court
Dougherty Judicial Circuit

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE

[Made July 17, 1986]

MR. DAVIS:

At this time Colonial Pipeline moves for the direction of a verdict, Your Honor, as to the claim of Wright Contracting Company in this case for punitive damages on the ground that there is just no evidence in the case to prove the kind of willful and wanton misconduct or other kind of conduct that the law contemplates is necessary in a case to make an award of punitive damages. [T. 701-702]

* * * *

And we further move for direction of a verdict with respect to punitive damages on our Constitutional ground, that is, that an award of punitive damages against Colonial in this case would violate its rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States and of the State Constitution and that an award of punitive damages in this case against Colonial would violate the Eighth Amendment against excessive fines. Those are our Constitutional grounds.

So the point that we make at this time on this motion, Your Honor, is that the Court should direct a verdict as to punitive damages and take it out of the case at this time. [T. 704]

* * * *

THE COURT:

I'll allow the issue to go to the jury on the issue of punitive damages. [T. 714]

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE EVIDENCE

[Made July 21, 1986]

Colonial Pipeline Company moves for direction of a verdict on the punitive damages, Your Honor, and the first ground is that the evidence demands a finding that Colonial was guilty of no conduct in this case which was willful, wanton or manifested an indifference to consequences, or which would otherwise authorize a recovery of punitive damages under the law, or that any acts that it did commit were not even the proximate cause of these damages. [T. 1149-1150]

* * * *

We further move on the ground that the statute O.C.G.A. 51-12-5, which provides for punitive damages, is unconstitutional and void on the ground; first, that it's violative of the due process clauses of the Fourteenth and Fifth Amendments of the United States Constitution and Article I, Section 1, paragraph one of the Constitution of the State of Georgia ... in that it compels payment of a penalty to a private party; it's not compensation for any loss. It exacts a penalty without any limitation as to amount, and it's arbitrary and unreasonable.

All laws, Your Honor, are bound by the fundamental requirement that they must bear some relationship to a governmental purpose, that they must not be arbitrary and they must not be unreasonable and that they must meet the test of fundamental fairness. Those are the due process requirements; fundamental fairness, not arbitrary and unreasonable. This statute does not do that. It exacts a penalty for conduct which is made a criminal offense, punishable under the laws of the state: O.C.G.A. 16-5-6 which punishes for reckless conduct, and O.C.G.A. 16-7-23 (A)(2), which punishes criminal damage to property. And if Colonial were prosecuted, there would be a limitation on the amount of the fine. They would be entitled to a full panoply of the rights in criminal cases; the right not to have to incriminate themselves through discovery, the right to have the burden of proof to be reasonable doubt and not preponderance of the evidence.

It is unreasonable and it's not fundamentally fair because it allows the award of damages to a private party without any relationship to that party's loss.

The statute fails to set any clear standard, criteria or limitation for the jury to apply in determining it, but on the other hand, it simply leaves it up to the unbridled judgment of one random jury, out of all the people in the United States, as to what to give with no adequate standard at all. It constitutes an unjust enrichment of the Plaintiff at the Defendant(s)' expense; it serves no legitimate governmental purpose; it's arbitrary and unreasonable, as I have said. It violates the Equal Protection Clause of the Fourteenth and Fifth Amendments to the United States Constitution and the Georgia Constitution, Article I, Section 1, paragraph 2, in that each award of punitive damages represents an award that speaks to the conscious of a particular juror with no uniformity, thus omitting [sic] awards under the same or similar circumstances to vary widely and wildly in amount, according to the particular random notions of one group of people. [T. 1150-1153]

* * * *

THE COURT:

I'll overrule all the motions except as to the consequential damages relating to the cost overrun. [T. 1153-1154]

EXCEPTION TO THE CHARGE OF THE COURT

[Made July 21, 1986]

MR. DAVIS:

. . . . We except to the Court's charge in the case on punitive damages on the ground that it's not authorized by the evidence and also that an award of punitive damages would be unconstitutional. And I'm not going to go into details; Your Honor has already heard it twice from us. I'll just adopt what I said on my motion for the direction of verdict.

THE COURT:

All right. All your grounds raised as to constitutionality of punitive damages claims will be the same as those stated in your motion for a directed verdict. [T. 1158-1159]

IN THE SUPERIOR COURT
OF DOUGHERTY COUNTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY, Plaintiff, vs. COLONIAL PIPELINE COMPANY, W. BAXTER BROWN AND MALCOLM BURNSED, Defendants.	CIVIL ACTION FILE NO.83-V-518

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

[Filed August 1, 1986]

A. The defendant Colonial Pipeline Company moves the Court for an order setting aside the verdict rendered in the above action, and the judgment entered thereon, and entering a judgment notwithstanding the verdict in accordance with its Motion for Direction of Verdict made at the close of all of the evidence, on the following grounds:

* * * *

8. The evidence demands a finding in favor of the defendant Colonial Pipeline Company as to punitive damages because the punitive damages statute, O.C.G.A. § 51-12-5, both on its face, and in its application to the defendant Colonial Pipeline Company in this case, denies Colonial Pipeline Company due process of the law as guaranteed to Colonial Pipeline Company by the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Article I, Section I, Paragraph I, of the Constitution of the State of Georgia.

9. The evidence demands a finding in favor of the defendant Colonial Pipeline Company as to punitive damages because the statute allowing punitive damages, O.C.G.A. § 51-12-5, is unconstitutional on its face, and as applied to the defendant Colonial Pipeline Company in this case, in that it denies Colonial Pipeline Company equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Article I, Section I, Paragraph II, of the Constitution of the State of Georgia.

* * * *

LANDAU, DAVIS AND FARKAS, P.C.

By: /s/ JAMES V. DAVIS
James V. Davis

IN THE SUPERIOR COURT
OF DOUGHERTY COUNTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY,
Plaintiff,
vs.
COLONIAL PIPELINE COMPANY, et al.,
Defendants.

CIVIL ACTION
NO. 83-V-518

AMENDMENT TO MOTION FOR NEW TRIAL OF COLONIAL PIPELINE COMPANY

[Filed November 10, 1986]

Defendant Colonial Pipeline Company tenders herewith its amendment to its motion for new trial heretofore filed, confirming and reasserting each of the original grounds of its motion for new trial, and moves the Court for an order setting aside the verdict in the captioned case, and the judgment entered thereon, and granting said Defendant a new trial on each and every ground set forth in the original motion for new trial and in this amendment:

* * * *

12. The court erred in charging the jury on the issue of punitive damages, as follows:

"In a tort action in which there are aggravating circumstances, either in the act or the intention, the jury may give additional damages. The purpose of these additional damages is to deter the wrongdoer from repeating the trespass.

"Punitive, that is, aggravated damages, may be authorized when the circumstances of the wrong are such as to show an entire want of care and an indifference to consequences. The measure of such damages is your enlightened conscience as an impartial jury." (T. 1248)

Said charge was erroneous in that it was an incorrect statement of the law applicable to the case, was not authorized by the

evidence, there being no evidence of the kind, nature or sufficiency to authorize a recovery of punitive damages, was not adjusted to the evidence and issues in the case, was confusing, and was misleading.

Said charge was further erroneous because the Georgia statute authorizing punitive damages, O.C.G.A. § 51-12-5, and its application to the Defendant Colonial in this case, are unconstitutional, being a denial of due process of the law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section I, Paragraph I of the Constitution of the State of Georgia, and being a denial of equal protection of the law as guaranteed to the Defendant Colonial by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Section I, Paragraph II of the Constitution of Georgia of 1983, and constituting an excessive fine and cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution of the United States of America.

The Defendant Colonial duly excepted to said charge on said grounds. (T. 1258)

* * * *

By: /s/ JAMES V. DAVIS
James V. Davis

By: /s/ RICHARD D. HALL
Richard D. Hall

By: /s/ EDGAR A. NEELY III
Edgar A. Neely III

By: /s/ RICHARD B. NORTH, JR.
Richard B. North, Jr.

IN THE SUPERIOR COURT
OF DOUGHERTY COUNTY
STATE OF GEORGIA

WRIGHT CONTRACTING COMPANY,

Plaintiff,

vs.

COLONIAL PIPELINE COMPANY, W. BAXTER BROWN AND MALCOLM BURNSED,

Defendants.

CIVIL ACTION

FILE NO. 83-V-518

ORDER

[Filed June 11, 1987]

Upon consideration of the motion for new trial and motion for judgment notwithstanding the verdict, filed on behalf of defendant Colonial Pipeline Company, the same are hereby denied and counsel for plaintiff is hereby directed to prepare and submit a final judgment based upon the verdict rendered in said case.

This the 8 day of June, 1987.

/s/ LORING A. GRAY, JR.
LORING A. GRAY, JR.
Judge of Superior Court
Dougherty County, Georgia

IN THE SUPREME COURT
STATE OF GEORGIA

COLONIAL PIPELINE COMPANY, Movant/Appellant, v. WRIGHT CONTRACTING COMPANY, et al., Respondents/Appellees.	CASE NO. 44962

MOTION FOR REHEARING ON BEHALF OF COLONIAL PIPELINE COMPANY

[Filed March 25, 1988]

In its opinion in this case rendered March 17, 1988, a copy of which is attached, a plurality of the Court found that the trial court erred in denying Colonial's motion for new trial as to punitive damages. Because Justice Weltner concurred in the judgment of reversal, Colonial has been relieved of the $5,000,000 punitive damage judgment entered against it and is entitled to a new trial as to punitive damages, about which Colonial is certainly pleased.

However, if the Court would rule upon the constitutionality of O.C.G.A § 51-12-5 based upon Colonial's due process and equal protection arguments under both the federal and state constitutions (*see* Brief of Appellant Colonial Pipeline Company, pp. 22-28), then no new trial as to punitive damages would be required.

Colonial's equal protection argument is now particularly compelling in light of the plurality's recognition in this case that "Punitive damages 'are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (94 S.C. 2997, 41 L.E.2d 789) (1974)." (Slip op., p. 7.)

Colonial respectfully moves for rehearing upon the constitutional grounds set forth above, to wit: the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia.

Respectfully submitted,

/s/ ROSS ARNOLD
Ross Arnold

/s/ JAMES V. DAVIS
James V. Davis

/s/ RICHARD D. HALL
Richard D. Hall

/s/ HAROLD N. HILL, JR.
Harold N. Hill, Jr.

/s/ EDGAR A. NEELY, III
Edgar A. Neely, III

/s/ RICHARD B. NORTH, JR.
Richard B. North, Jr.

(2)

Supreme Court, U.S.
FILED
JUL 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2007

In The

Supreme Court of the United States

October Term, 1987

COLONIAL PIPELINE COMPANY,

Appellant,

v.

WRIGHT CONTRACTING COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

*Paul Z. Lewis
Michael F. McKenna
Mary F. Thurber
Lewis & McKenna
82 East Allendale Road
Saddle River, NJ 07458
(201) 934-9800
Attorneys for Appellee
*Counsel of Record

Of Counsel:
Mark A. Gonnerman
Dawn G. Benson
Thomas S. Chambless
Watson, Spence, Lowe
& Chambless
320 Residence Avenue
P.O. Box 2008
Albany, GA 31703-2001
(912) 436-1545

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STATUTES:

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STATEMENT OF MOTION

Comes now WRIGHT CONTRACTING COMPANY ("Wright"),* appellee, and moves the Court to dismiss the instant appeal on the grounds that the appeal is not within the Court's jurisdiction, that the judgment sought to be appealed is not final, that the constitutional issues raised by the appellant were not expressly passed on by the court below, that the case and decision below do not present the kind of clear, well-developed record necessary for the Court properly to consider the constitutionality of Georgia's statute in issue, and that the appellant is not aggrieved.

Colonial Pipeline Company ("Colonial") obtained an easement from landowners for laying pipeline through which it would pump highly combustible liquid petroleum at high pressure. Future development of the land was foreseeable and contemplated. In 1976, Colonial had the pipeline installed *thirty-one and three-quarter inches* above the depth specified in the easement. Thereafter Colonial engaged in myriad reckless acts that further invited the disaster that eventually occurred—during a 1982 grading operation by appellee, the unmarked, mislaid pipeline was struck and ruptured, creating an inferno. Wright brought suit seeking compensatory, consequential, and punitive damages. After an eight-day trial, a jury of twelve awarded Wright damages from Colonial, including punitive damages in the amount of five million dollars.

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*Wright Contracting Company was merged into The Hardaway Company, which was acquired by Murphree & Lisle Co., which now does business as The Hardaway Company. The Hardaway Company has no corporate affiliates.

Colonial repeatedly sought, first from the trial court and then from the Georgia Supreme Court, relief from the punitive damages award by means of a new trial. The supreme court did not even acknowledge appellant's equal protection argument, and expressly declined to pass on the due process argument. The Court agreed with appellant's alternative argument that the award was excessive and granted the very relief sought by the appellant—a new trial. The judgment is not yet final, as a new trial remains to be held.

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LEGAL ARGUMENT

I. The Appeal Is Not Within the Court's Jurisdiction Because No Final Judgment Was Rendered

This Court's jurisdiction does not extend to review of non-final judgments of state courts. "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.'" *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Clearly, there is no final judgment in this case as the Georgia Supreme Court has remanded the cause for a new trial on the issue of punitive damages, the very issue with which this appeal is concerned.

The finality requirement serves the purpose of limiting "review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy*

v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973). The requirement is not merely a technicality, but "an important factor in the smooth working of our federal system." *Radio Station WOW, supra,* 326 U.S. at 124.

As Chief Justice Rehnquist pointed out in his dissenting opinion in *Cox, supra,* the finality requirement for jurisdiction over a judgment of a state court is grounded on more serious concerns than the limitation of jurisdiction over decisions of district courts, because of the differing underlying concerns. In this context, the statutory concept of finality is predicated not merely upon judicial efficiency but also upon congressional concern that uncontrolled federal judicial interference with state administrative and judicial functions would be detrimental to the federal system. *Cox, supra,* 420 U.S. at 503 (Rehnquist, J., dissenting). The dissent, citing Justice Frankfurter, expressed the view that these concerns are particularly serious when a constitutional challenge is asserted against a state court's decision on the state's own law. *Id.* at 504-05.

In addition, this Court has long upheld the principle that constitutional issues are too important to be decided except when absolutely necessary. This Court's policy of strict necessity in disposing of constitutional issues was discussed in *Minnick v. California Dept. of Corrections,* 452 U.S. 105 (1981). In that case, the Court quoted from *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947), commenting on the close connection between the policy of avoiding premature adjudication of constitutional issues and limitations on the Court's jurisdiction. The *Rescue Army* court described the policy as a corollary of the case and controversy rule. The Court stated, "The policy's

ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality." 331 U.S. at 571. The Court pointed out that while this policy results in the deferring of decisions in order to protect the functioning of government "and all its coordinate parts," the premature and relatively abstract decisions that would result if the policy were not followed "have their part too in rendering rights uncertain and insecure." 331 U.S. at 571.

The importance of the finality requirement must not be underestimated. Within the framework of the foregoing cases, it is clear that the Court should not entertain Colonial's appeal. Appellant cites *Cox Broadcasting, supra,* for its contention that the requirement of finality is satisfied. Jurisdictional Statement at 3, n. 3. In *Cox,* the Georgia Supreme Court had upheld against first amendment challenges a statute prohibiting the publication of the name of a rape victim. This Court determined that it would treat that judgment as final, despite the further proceedings pending in the state court. Writing for the Court, Justice White identified four categories of cases in which the Court has treated a decision on a federal issue as a final judgment even though additional proceedings remained to be held in the lower courts. This case does not fall within any of the categories enumerated, in which "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' . . . as well as precipitate interference with state litigation." *Cox, supra,* 420 U.S. at 477-78 *(quoting Radio Station WOW, supra).* In cases in two of

the four categories, "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." Id. at 478.**

Appellant does not seek to bring itself within either of those exceptions. Rather, it likens its case to that of *Cox*. It argues that even though it might prevail at trial on non-federal grounds, which would obviate the constitutional question, this Court should treat the judgment as final and render a constitutional decision that might otherwise prove unnecessary.

The reasons that justified that decision in *Cox* are not present here. The *Cox* Court stated that in those cases in which the federal issue has been finally decided with further proceedings pending, *and* where a reversal of the state court on the federal issue would be preclusive of any further litigation, *and* where the refusal to review immediately the state court decision might seriously erode federal policy, the Court *may* decide the federal issue. The case at bar does not meet the criteria of the above-defined

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** The first category includes cases in which further proceedings will be held but where the federal issue decided is conclusive and the outcome of further proceedings preordained so that the case is for all practical purposes concluded. Appellant could well prevail on the merits at the retrial on non-federal grounds, particularly given the Georgia Supreme Court's interpretation in this case.

The second category of cases includes those in which the federal issue will survive and require a decision regardless of the outcome of future state court proceedings. In this case, since the matter may be resolved in favor of the appellant on non-federal grounds, it is highly questionable whether the federal issue would survive and require a decision.

exception to the finality requirement. First, appellant has not established that the state court finally decided the federal issue. Indeed, the state court significantly revised the interpretation of the Georgia punitive damages statute and remanded the case for trial under the new criteria. Thus, not only have the federal issues never been expressly decided in the state court, but the new state court interpretation of the punitive damages law has not even been applied to the facts.

If this Court established due process guidelines for the trial of punitive damages, that would "merely contro[l] the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come," *Cox, supra,* 420 U.S. at 483. It would not be preclusive of further litigation.

There is also no reason to suspect that the Court's refusal to review immediately the state court decision might seriously erode federal policy. The case does not involve any potential criminal liability nor does it involve first amendment rights, so that jurisdiction would be necessary to foreclose unwarranted restrictions on the press. Further, there is no reason to believe the retrial, limited solely to the issue of punitive damages, will be particularly complex or lengthy or a significant enough burden on the appellant that this Court should undertake a premature evaluation of constitutional issues, which might never arise if the retrial is permitted. Finally, this is simply not a case where these or other parties will be uncertain about the propriety of future conduct or exposed to unreasonable risk of liability pending the resolution of these issues, as would be the case in those instances where the question presented is whether certain conduct

could result in the imposition of criminal penalties or civil liability in the first instance. *Cox, supra,* 420 U.S. at 486.

Appellant makes an oblique reference, for the first time in the history of this litigation, to rights against "double jeopardy." Jurisdictional Statement at 3, n. 3. This argument should not be considered, because raised now for the first time. Furthermore, appellant's effort to excite the Court's sympathies by trying to come under the mantle of protections afforded criminal defendants should not avail it. This is not a criminal case; the principles sought by appellant do not apply.

II. The Record is Inadequate For the Court to Consider the Issues Raised by Appellant.

Although the appellant raised the issues of due process and equal protection in the state courts, the majority of the court did not directly address either of these issues. In fact, the plurality decision did not even acknowledge the equal protection claim. Appellee submits that the requirement that a federal issue be both raised and decided in the state court before it may properly be addressed by this Court is a jurisdictional and not merely a prudential restriction. *See State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154 (1945), *reh'g denied,* 324 U.S. 887 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940); and cases discussed in *Illinois v. Gates,* 462 U.S. 213, 218-19, *reh'g denied,* 463 U.S. 1237 (1983).

Even if this Court determines, however, that the "not pressed or passed upon below" rule is a prudential restriction rather than a jurisdictional one, those prudential con-

siderations should lead this Court to decline review of appellant's claims. "These policies are first, comity to the states, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1651 (1988). Because the questions raised on the issues of due process and equal protection are particularly difficult issues and because a decision thereon would have far-reaching consequences on issues of great public importance, this court should scrupulously adhere to the traditional limitations on its discretion. *Id.; Mishkin v. New York,* 383 U.S. 502 (1966).

The record in this case is not properly developed for review of the federal constitutional issues, and this Court does not have the benefit of an opinion of the state supreme court applying these federal principles to the state's law. Although appellant's claims of due process and equal protection were argued below, the opinion below did not address these issues. Further, the court significantly altered its interpretation of the state's punitive damages statute. In effect, the state supreme court issued new criteria for the determination of when and in what amount punitive damages can be awarded. Until the case has been retried on the basis of this new law, there will be no factual record developed under the punitive damages law in the State of Georgia as it now stands, nor will there be any appellate court application of the new law to these or other facts. Accordingly, the record is ambiguous as it relates to this new interpretation of Georgia law, and the Georgia courts themselves have not had an opportunity to test the newly enunciated legal precepts, as applied

to a concrete factual situation, against the limitations of the state or federal constitution.

The Georgia Supreme Court, in its opinion below, introduced requirements to the implementation of the punitive damage statute that may, in application, eliminate appellant's due process and equal protection concerns. The court held that in a punitive damages case the trier of fact must determine not only whether there is evidence of willful misconduct, malice, fraud, wantonness or oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences as required in *Southern Ry. Co. v. O'Brien,* 119 Ga. 147, 45 S.E. 1000 (1903), cited by the court, but that the jury must also determine whether personal injury or death was involved or mere damage to property, and whether the negligence was active or passive (Jurisdictional Statement, A-11). In addition, on rehearing, the court suggested that the jury be required, through use of an interrogatory-type verdict form, to specify the grounds on which it awarded damages, and to follow the court's new criteria in determining the amount. This includes consideration of whether negligence was active or passive and whether there was bodily injury or mere property damage, and requiring that the punitive damages award bear a "rational relationship" to the actual damages awarded and to the offense (Jurisdictional Statement, A-16).

Heretofore, when the Georgia courts have denied punitive damages on the ground of passive negligence, they have done so on the understanding that negligence that is truly passive cannot evidence willful misconduct, malice,

or other indicia of malice set forth in the *Southern Ry.* opinion. Dissent, Jurisdictional Statement, A-14; *see also Rossville Apartments Co. v. Britton*, 178 Ga. App. 194, 342 S.E.2d 504 (1986). The court held that passive negligence may be enough to permit punitive damages but that this factor should be considered by the jury in deciding whether to award the damages and in what amount.

Further, the court now requires the jury to consider whether there was bodily injury to the particular plaintiff involved. The court's holding in this regard represents a dramatic departure from all prior law. There has never before this case been a distinction between personal injury and property damage for the purposes of awarding punitive damages. In fact, in *Smith v. Milikin*, 247 Ga. 369, 276 S.E.2d 35 (1981), the Supreme Court of Georgia approved an award of $156.00 in actual damages and $50,000.00 in punitive damages in a land line case involving only property damages. Furthermore, there has never been a requirement in the State of Georgia that punitive damages bear any particular monetary or proportional relationship to the amount of actual damages as the court now requires. In fact, the Georgia Supreme Court specifically rejected that argument in *Smith v. Milikin, supra*, holding that where punitive damages were awarded to deter the wrongdoer, as in this case, the award was not required to evidence a reasonable proportion to the extent of the injury and was instead to be the amount, as measured by the enlightened conscience of an impartial jury, that would be required to deter future acts.

The Supreme Court has not yet had an opportunity to observe its new "rational relationship" standards (either

the relationship to the actual damages or to the offense) applied to the facts of this or any other case, nor to observe how each of its new criteria may affect the appellant's constitutional claims. Accordingly, until this newly-established law has actually been applied to the facts of the case and considered by the state's highest court, the question is not ripe for consideration by this Court, nor is the record one upon which so weighty a constitutional decision should be made. *See Banker's Life & Casualty Co., supra,* and *Minnick v. California Dept. of Corrections, supra.*

Perhaps even more importantly, the state legislature has already enacted legislation dramatically restricting the imposition of punitive damages in Georgia. O.C.G.A. Sec. 51-12-5.1, applicable to causes of action arising on or after July 1, 1987, enacts "a clear and convincing evidence" standard of proof, requires trial on whether punitive damages should be awarded and the amount thereof, limits awards in products liability cases to one award of punitive damages in Georgia from a defendant for any act or omission, places a $250,000 cap on punitive damages awards except in products liability cases and cases where the defendant specifically intended to cause harm, and provides that seventy-five percent of any punitive damages awards in products cases, less proportionate costs of litigation, be paid into the State treasury. There are no appellate decisions interpreting this new law and no consideration by the Georgia Court of Appeals or Supreme Court of the constitutionality of this new statute, which will soon make the law enunciated below in this case obsolete. In light of the state legislature's action in addressing the issue of punitive damages in such a sweep-

ing fashion, this Court has no reason now to decide the issues raised in this case, but should wait for a properly presented case under the new statute. *See Bankers' Life, supra,* 108 S.Ct. at 1651. Such a course of restraint is particularly appropriate in this case.

III. The Appellant Received Exactly the Relief It Sought in the State Court

Colonial has made various and repeated efforts to avoid the punitive damages award assessed against it by the jury. It did so by motion to the trial court and by appeal to the Georgia Supreme Court. Colonial moved for judgment notwithstanding the verdict and for a new trial. Colonial set forth in its appendix (A 28-29) only those portions of the motion seeking judgment that raised its constitutional arguments. Alternatively, Colonial sought a new trial. It urged the trial court to define the standards for punitive damages in a manner acceptable to Colonial. Motion for Judgment Notwithstanding the Verdict and Motion for New Trial; Amendment to Motion for New Trial of Colonial Pipeline Company (R 168-71, 183-86).

On appeal to the state supreme court Colonial argued that the award was excessive or, alternatively, if *not* excessive, that the award or the statute violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

The Georgia Supreme Court agreed with appellant that the punitive damages award was excessive. It granted the very relief sought by appellant—a new trial with clarified standards designed to cure any infirmities that had

allowed the excessive (according to that court) award. The court accepted appellant's invitation to avoid the constitutional due process and equal protection arguments by finding the award excessive. (Opinion, Jurisdictional Statement, A-5, n.2.) Appellant should not now be heard to argue that the court below erred in granting the relief appellant sought. The new trial under the new guidelines will amply protect Colonial's constitutional rights.

———o———

CONCLUSION

If this Court undertakes to decide the merits of the instant appeal, the result will be a decision on a broad, abstract question that may or may not have application to Georgia's law of punitive damages either as enunciated by the state supreme court for pre-July 1, 1987, cases or as enacted by the Legislature in its sweeping reform of the statutory law. The case is not appropriate for consideration by this Court at the present time. The constitutional issues have not been directly addressed, under either Georgia's former punitive damages law or the new statute, by the state supreme court; the decision below is not final; and the appellant obtained the relief sought below. The constitutional issues are premature, and this Court should dismiss the appeal.

Respectfully submitted, this 8th day of July, 1988.

*Paul Z. Lewis
Michael F. McKenna
Mary F. Thurber
Lewis & McKenna
82 East Allendale Road
Saddle River, NJ 07458
(201) 934-9800
Attorneys for Appellee
*Counsel of Record

Of Counsel:
Mark A. Gonnerman
Dawn G. Benson
Thomas S. Chambless
Watson, Spence, Lowe
& Chambless
320 Residence Avenue
P.O. Box 2008
Albany, GA 31703-2001
(912) 436-1545

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No. 87-2007

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1987

COLONIAL PIPELINE COMPANY,
Appellant,

v.

WRIGHT CONTRACTING COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

*HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

*Counsel of Record

Of Counsel:
ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607, 3400 Peachtree Road, N.E.
Atlanta, Georgia 30326

JAMES V. DAVIS
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702

EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303-2122

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APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

Appellee's Motion to Dismiss is based upon three grounds, as follows:

(1) The appeal is not within the Court's jurisdiction because the judgment sought to be appealed is not final;

(2) The record is inadequate because the constitutional issues were not expressly passed upon by the court below; and

(3) Appellant received exactly the relief it sought in the state court, a new trial.

These grounds will be considered in reverse order after the status of this case is briefly reexamined.

The jury returned a $5,000,000 punitive damage award against Colonial Pipeline Company based upon its passive negligence resulting in property damage to Wright Contracting Company's $53,000 bulldozer. Colonial appealed to the Supreme Court of Georgia urging, first, that the evidence was insufficient to support a verdict against Colonial and was particularly insufficient to support a verdict awarding punitive damages against Colonial; second, that the $5,000,000 punitive damage award was excessive, under existing [common law] standards, as a matter of law; and third, that Georgia's punitive damages statute, O.C.G.A. § 51-12-5, and the $5,000,000 punitive damage award are unconstitutional and void as denials of due process and equal protection guaranteed by the Fourteenth Amendment and the Constitution of Georgia, and because the statute permits and the verdict and judgment constitute an excessive fine in contravention of the Eighth Amendment and its counterpart, Art. I, Sec. I, Par. XVII, in the Georgia Constitution.[1]

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[1]A plurality of the Supreme Court of Georgia found the $5,000,000 punitive damage award to be an excessive fine under the state constitution and the case was remanded for a new trial as to punitive damages. Colonial had urged additional errors in the court below not pertinent here.

If the Georgia statute which allows punitive damages, O.C.G.A. § 51-12-5, *supra*, were declared unconstitutional and void as violative of due process and equal protection, as urged by Colonial, there could be no recovery of punitive damages in this case, as Colonial pointed out to the Georgia Supreme Court (J.S. App. A-33).

In the trial court Colonial had moved to dismiss that count of Wright's complaint seeking punitive damages (J.S. App. A-20). During the trial, it had moved for directed verdicts disallowing punitive damages based upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment (J.S. App. A-24 and A-25). Following the trial it had moved for judgment notwithstanding the verdict on those same grounds (J.S. App. A-28). On appeal, it urged the enumerations of error set forth above, and following the decision of the court below it moved for rehearing, pointing out that a favorable ruling on its due process and equal protection attacks upon the statute would obviate the necessity for a new trial (J.S. App. A-33).

A.

Therefore, for Wright to urge before this Court that "The Appellant Received Exactly the Relief It Sought in the State Court" (Motion to Dismiss, Section III, p. 12), namely: a new trial, shows at least a complete failure to recognize the relief Colonial has sought throughout this litigation, to wit: a determination that O.C.G.A. § 51-12-5, pursuant to which punitive damages are allowed in Georgia, violates, *inter alia*, the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Thus, the third ground of Wright's Motion to Dismiss is not in accord with the record. Moreover, the fact that a party obtained partial relief in the court below, but not the relief sought as to the federal constitutional issues raised, is not a ground on which to dismiss an appeal.[2] Ground three (3) of Wright's Motion to Dismiss therefore is without merit.

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[2]Where a party obtains partial relief, a question of finality (discussed below) may arise, but not a question of "satisfaction" or "estoppel", as appellee implies.

B.

Regarding ground two (2) of Wright's Motion to Dismiss, the Supreme Court of Georgia did pass upon these constitutional issues (and Wright does not dispute that it did). It ordered Colonial to return to the trial court for a new trial as to punitive damages. If, as Colonial contends, O.C.G.A. § 51-12-5 is a violation of the Fourteenth Amendment, then punitive damages are not allowable in this case and there is no need for a new trial. By remanding this case for retrial as to punitive damages, the Georgia Supreme Court necessarily passed upon and upheld the validity of O.C.G.A. § 51-12-5, *sub silentio.*

As rightly held in *Lawrence v. State Tax Comm'r.*, 286 U.S. 276, 282 (1931), a person's "... constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it ...." The Supreme Court of Georgia's refusal to acknowledge that by ordering a new trial as to punitive damages, it was upholding the validity of the statute authorizing punitive damages cannot defeat this Court's jurisdiction. See *Banker's Life and Casualty Co. v. Crenshaw*, U.S. , 108 S.Ct. 1645 (1988), where the Court decided the validity of a state statute notwithstanding the absence of an opinion by the Mississippi Supreme Court upholding its validity.

Wright urges that Colonial has sought and obtained "clarified standards" and "new guidelines" (Motion to Dismiss, pp. 12 and 13). While Colonial disputes the adjectives, it rejects the nouns. Colonial seeks a determination that punitive damages as allowed by O.C.G.A. § 51-12-5 constitute a denial of due process and equal protection to Colonial and are not recoverable by Wright. While the result of this Court's decision should be "clarified standards" and "new guidelines" for others, for Colonial and Wright this Court's decision in favor of Colonial will end this litigation.[3]

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[3]Wright argues that the court below altered its interpretation of Georgia's punitive damages statute and issued new criteria which will be applicable at the retrial (Motion to Dismiss, p. 8). Such new criteria are inapplicable, Colonial contends, because the statute interpreted by the court below is unconstitutional.

Wright also argues that the Court does not have the benefit of an opinion by the court below addressing the constitutional issues raised (Motion to Dismiss, p. 8). The absence of an opinion by the court below discussing the constitutional issues is not grounds for dismissing an appeal. See *Rogers v. Alabama*, 192 U.S. 226, 229-230 (1904); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). As stated in *Zimmerman, supra*, 278 U.S. at 67: "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough [footnoted citations omitted]." See also *Lawrence v. State Tax Comm'r., supra; Banker's Life and Casualty Co. v. Crenshaw, supra.*[4]

Moreover, the Court need not be concerned that there are no authorities discussing the issues, because such authorities do exist. In addition to the many cases discussing the requirements of due process and equal protection (e.g., the requirement of notice and the void for vagueness cases), there are numerous decisions of this Court considering the validity of punitive damages and other penalties. In the first such case, the Court in *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885), upheld the validity of a statute authorizing exemplary or additional damages by way of punishment (double actual damages) for a railroad's failure to fence its track, resulting in injury to horses, cattle or mules, where the legislature fixed the amount of such damages or prescribed the limit within which the jury could exercise its

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[4]Appellee misinterprets the "not pressed or passed upon" rule (Motion to Dismiss, p. 7). This Court has jurisdiction if the constitutional issue was either pressed or expressly passed upon in the court below. It is not necessary to the Court's jurisdiction that such issue be both pressed and expressly passed upon by the court below. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 150 (6th ed. 1986).

discretion. *Humes*, 115 U.S. at 522.[5] See also *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 34 (1889). In O.C.G.A. § 51-12-5, the Georgia legislature has neither fixed the amount of, nor prescribed the limits of, punitive damages.

In *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340 (1913), the Court held invalid a statute which imposed a $500 penalty upon common carriers transporting oil, gasoline, etc., intrastate and charging a rate in excess of that fixed by law. The railroad charged Mr. Tucker $3.02 more than the law authorized and was assessed the $500 penalty. Because the law provided no mechanism for the railroad to challenge the validity of the statutory rate, the Court found: "As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment." *Tucker*, 230 U.S. at 351. Compare *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

In *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), the Court found that a penalty of $6,300 ($100 per day for 63 days) imposed upon a telephone company "... was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law". *Danaher*, 238 U.S. at 491. But see *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912)(penalty of $50,000 upheld); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909)(penalty aggregating $1,549,500 upheld).

In *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35 (1922), the Court collected and analyzed the cases imposing penalties and attorney fees upon railroads for failure to promptly pay claims and concluded that a reasonable penalty may

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[5]The earlier case of *Day v. Woodworth*, 13 How. 363 (1851), is sometimes cited as upholding the constitutionality of punitive damages. That case, however, dealt with the correctness of the district court's jury instructions as to punitive damages, not their constitutionality.

be imposed upon them, saying: "But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it." *Nye-Schneider-Fowler Co.*, 260 U.S. at 44.

In *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*, 274 U.S. 112 (1927), the Court upheld the validity of a wrongful death statute which authorized a jury to assess punitive damages against an employer for the mere negligence of its employee.

In *Life & Casualty Ins. Co. of Tenn. v. McCray*, 291 U.S. 566 (1934), the Court approved a statute imposing a 12 percent penalty, plus attorney fees, upon a life insurance company's good faith refusal to pay the proceeds of a policy, saying: "The Fourteenth Amendment does not prohibit a fixed award of damages, moderate in amount, in addition to the costs and the fees of the attorney, when the payment of a policy of life insurance has been wrongfully refused." *McCray*, 291 U.S. at 570.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), the Court found Georgia's punitive damages law not to violate the First Amendment. Thus, the Court has the benefit of its prior decisions in this area, decisions more valuable than an express decision by the plurality of the court below.

To the foregoing decisions of this Court, add *Fay v. Parker*, 53 N.H. 342 (1873), where the court examined the extant decisions and concluded that "[p]unitive damages destroy every constitutional safeguard within their reach." *Fay*, 53 N.H. at 397. With *Fay*, compare the dissent in the case at bar as arguing in favor of the constitutionality of punitive damages (J.S. App. A-12). See also *Abel v. Conover*, 170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960).

And to the foregoing authorities add the following: Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 Tort & Ins. L.J. 244 (1987); Ghardi & Kircher, *Punitive Damages Law and Practice*, § 3.01-3.07 (1985); Grass, *The Penal Dimensions of*

Punitive Damages, 12 Hastings Const. L.Q. 241 (1985); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Leitner, *Punitive Damages: A Constitutional Assessment*, 38 Fed'n Ins. & Corp. Couns. Q. 119 (1988); Reisberg, *In Defense of Punitive Damages*, 55 N.Y.U. L. Rev. 303 (1980); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967); Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. Rev. 99 (1987).[6]

The authorities are ample so that the absence of a decision by the plurality of the Supreme Court of Georgia discussing the validity of Georgia's punitive damages statute will not hinder this Court in reaching a decision in this case.

Lastly, O.C.G.A. § 51-12-5.1, cited by Wright (Motion to Dismiss, p. 11), is applicable only to causes of action arising after July 1, 1987. It is not applicable here and will not be applicable at retrial. If anything, that revision shows that the Georgia legislature recognized that the statute in issue here was unjust, if not unconstitutional. Ground two (2) of Wright's Motion to Dismiss therefore should be denied.

C.

In ground one (1) of its Motion to Dismiss, Wright argues that this appeal should be dismissed because the judgment of the Supreme Court of Georgia sought to be appealed is not final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), sets forth the categories of cases in which judgments are deemed to be final within the meaning of 28 U.S.C. § 1257. This case falls within the

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[6]Messrs. Beckman, Grass and Wheeler would be shocked to hear that Wright needed only thirteen words to conclude that "This is not a criminal case; the principles sought by appellant do not apply." (Motion to Dismiss, p. 7). See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

first and fourth categories recognized in *Cox* and within *Cox* itself.

"In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, *supra*, 420 U.S. at 479. Here the federal issue is conclusive.

Also, this case fits within the fourth *Cox* category and within *Cox* itself. Here, as in *Cox*, "The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all." 420 U.S. at 485.

It is true that *Cox* involved freedom of the press, but freedom of the press does not impact upon finality within the meaning of 28 U.S.C. § 1257. On the other hand, as in *Cox*, there is serious doubt as to the constitutionality of punitive damages according to the opinions of this Court, ***Aetna Life Ins. Co. v. Lavoie***, 475 U.S. 813, , 106 S.Ct. 1580, 1589 (1986); ***Bankers Life and Casualty Co. v. Crenshaw***, U.S , 108 S.Ct. 1645, 1651, 1655-56 (1988), and many litigants, lawyers and judges are awaiting a decision by this Court on the constitutional validity of punitive damages.[7]

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[7]Forty five states allow recovery of punitive damages, subject to limitations and conditions in some states, while five states forbid their recovery (Louisiana, Massachusetts, Nebraska, New Hampshire and Washington). Peterson, Sarma, & Shanley, ***Punitive Damages: Empirical Findings***, 1 n.1, Rand Corp., Institute for Civil Justice, Report No. R-3311-ICJ (1987). O.C.G.A. § 51-12-5 in issue here was codified from the common law. See Editorial Note, Ga. Code Ann. § 105-2002 (Harrison 1968). Hence, the laws in those forty-five states which allow recovery of punitive damages are likely to be affected to a greater or lesser degree by the decision in this case.

Moreover, Colonial should not be subjected to retrial under an unconstitutional statute because retrial itself denies Colonial its due process and equal protection rights against double jeopardy (to wit: a second trial to impose punishment). See *Abney v. United States*, 431 U.S. 651 (1977).[8]

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[8]Wright argues that Colonial is raising its double jeopardy argument for the first time on this appeal (Motion to Dismiss, p. 7). This defense did not exist prior to the remand of this case by the court below for retrial as to punitive damages. Moreover, the double jeopardy defense could be timely raised in the trial court upon remand and hence it certainly can be raised before that time in this Court in urging that probable jurisdiction should be noted and as being fairly encompassed in the other due process and equal protection issues being raised.

The decision of the court below is final within the meaning of 28 U.S.C. § 1257. Wright's Motion to Dismiss therefore should be denied and probable jurisdiction should be noted.[9]

August 12, 1988

Respectfully submitted,

* HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

* Counsel of Record

Of Counsel:
ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
JAMES V. DAVIS
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702
EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303

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[9]A dismissal of this appeal could mislead the lower courts, both state and federal. See *Hicks v. Miranda*, 422 U.S. 332 (1975).